Based on Lawrence's refusal to keep management informed, refusal to return to work despite his doctor indicating he could return, and insubordination, management placed Lawrence on probation and told him that he must obtain approval from one of two specific managers for any future leave, must schedule medical appointments off-hours, and must perform his job with no further problems or he would be terminated. (Tab 33, 455, 470-473).

By July 2001, Lawrence had again exceeded his allowed time off. However, Lawrence continued to miss work after this due to various medical complaints.

On August 26, 2001 Lawrence called his supervisor to report he would be late due to his son's sickness. (Tab 34, 655). The following day, Lawrence asked a co-worker to tell his supervisor that he would be out two or three days due to yet another sinus infection. Lawrence admitted that he was instructed to tell only one of two specific managers or his supervisor about absences, however, he contended that management could not tell him who to report absences to because WSRC policy does not authorize such a restriction. (Tab 1, 100, 129). Lawrence said he would be at his mother's house. Thigpen reported to higher management that Lawrence had disobeyed his instructions about whom to contact regarding absences. Thigpen was unable to reach Lawrence by phone. After repeated messages, Lawrence finally called his supervisor back. He became angry, yelled, cursed his supervisor, and told him he would deal with him when he got back. (Tab 35, 664-665). Lawrence admitted in his deposition that he spoke to Thigpen in this manner. (Tab 1, 129-130).

Based on this complete disregard for his employment and contempt for his supervision and instructions, WSRC

decided to terminate Lawrence's employment effective August 31, 2001. When Lawrence attempted to return to the site, he was escorted away by security personnel. Because Lawrence was terminated, he was not allowed back onsite and a representative of WSRC went to Lawrence to return his belongings. (Tab 1, 132).

ARGUMENT

This Case Does Not Present Any Compelling Ground for Supreme Court Review

Under Supreme Court Rule 10, a petition for writ is granted only for "compelling grounds." Rule 10 lists the most common compelling grounds as: (1) a question on which the courts of appeal are in conflict; (2) a state court has issued a decision on a federal question that is in conflict with decisions of other state courts; or (3) a state, or federal court of appeals, has decided an important federal question that should be reviewed by the Supreme Court or is in conflict with a prior decision of the Court.

Rule 10 specifically provides that review is "rarely granted" when the issue is only an alleged misapplication of law or procedural error.

Lawrence has not raised any issue that Rule 10 recognizes as compelling. In fact, the grounds he raises are solely alleged misapplication of law to fact or procedural error. He has alleged, without basis, racial bias, misapplication of South Carolina contract law, and procedural errors by the lower courts. None of the reasons he raises warrant review by this Court.

Lawrence's Claims of Racial Bias Against Him as a Pro Se Petitioner are Wholly Without Merit and are Time-Barred

A consistent theme throughout Lawrence's Petition is that the Magistrate Judge, the District Court Judge, and the Judges of the Fourth Circuit Court of Appeals were biased against him because he was an African-American pro se litigant. However, other than the fact that these courts consistently ruled against him, and his allegations that they committed various procedural errors, he has no evidence to suggest such bias.

If Lawrence thought that the judges involved in this matter were biased against him, he was required to file a motion to recuse. He never filed such a motion with any of these courts. To the extent Lawrence's objections might be considered a request to recuse, those requests were untimely – coming only after adverse rulings against him. "A motion to recuse must be filed promptly after the allegedly disqualifying facts are discovered." *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987). "Granting a motion to recuse many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process." *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1029 (10th Cir. 1988).

In any event, all of Lawrence's illustrations of alleged bias are merely adverse rulings by the judges (e.g., denial of motions to compel, granting of summary judgment, denial of request to extend time for discovery, denial of requests for subpoenas). Adverse rulings alone do not constitute grounds for disqualification. While they may be proper grounds for appeal, they are not grounds for requesting reversal based on bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Lawrence's allegations of racial

bias are conclusory and unsupported. "[U]nsupported, irrational or highly tenuous speculation" is an inappropriate ground for recusal or appeal on the basis of bias. *Hinman v. Rogers*, 831 F.2d at 939.

Lawrence's Contentions of Procedural Errors are Without Basis

Many of the issues in Lawrence's Petition have to do with his perception that the Magistrate Judge erred in making discovery rulings and in marshalling the evidence so that the judge could issue a Report and Recommendation on WSRC's motion for summary judgment.

In order to understand why the Magistrate acted as he did, it is important to review the extraordinary number of filings that Lawrence submitted. The following history illustrates a *partial* view of Lawrence's prolific filings to the court. Following discovery, on January 5, 2004 WSRC filed a motion for summary judgment and memorandum in support. Lawrence filed a response on January 21, a second response on January 27, a third response on January 28, an amended response on February 5, and supplements to his response on February 10. WSRC replied to these various filings (once) on February 17. Lawrence followed this reply with a response on February 20, a motion on March 3, supplemental materials on April 13, and a supplemental brief on May 25. Many of Lawrence's submissions were very lengthy and were accompanied by hundreds and hundreds of pages of attachments.

Faced with this onslaught, on June 8, 2004, the Magistrate Judge ordered the parties to appear for a hearing regarding summary judgment. At that hearing, the Judge ordered the parties to confer (at the hearing)

and list the facts upon which they could agree. The Judge did this to force the parties (really Mr. Lawrence) to focus on the specific facts and arguments that the court needed to consider and to consolidate the numerous filings. The parties conferred and, from notes prepared during the conference, read the uncontested facts into the record at the same hearing. The judge ordered that WSRC was to reduce this statement to writing and file it and that both parties were to submit statements of contested fact. (Tr. p. 6).[6] Each party was permitted a time to respond to the statement of disputed facts and to file briefs based on the statements of contested and uncontested facts. Contrary to Lawrence's allegations, the court never said it would rely only on the statement of undisputed facts to rule on the motion for summary judgment nor did it say that the parties were limited to the statements of fact. To the contrary, the judge noted on page 8 of the transcript that the parties could argue (in the briefs) "a particular fact . . . outside the agreed statement of facts." The judge even allowed for the possibility that the parties may, in their briefs, argue against a fact that was previously agreed to. (Tr. p. 21).

As directed by the court, WSRC filed a new summary judgment motion and memorandum in response and statements of uncontested and contested facts. Lawrence filed a response to the motion and filed a memorandum alleging the statement of uncontested facts was not accurate in some details. WSRC filed a response conceding that some inadvertent errors were made in the statements. On July 17, 2004 the Magistrate Judge entered a

[6] "Tr." refers to the transcript of the hearing.

recommendation that the district court grant WSRC's motion for summary judgment. Lawrence filed untimely objections to the Report and Recommendation and WSRC responded. District Court Judge Bryan Harwell entered an order on March 31, 2005 granting the motion for summary judgment.

Lawrence alleges that the Magistrate Judge committed several errors and was misled, and biased toward, WSRC's counsel. These allegations are outrageous and spurious. Lawrence begins with the argument that there were several differences between the statement of uncontested facts that was read into the record and the subsequent written statement that was filed. These differences were inconsequential, irrelevant and, in any event, they were brought to the attention of the court.

For example, Lawrence alleges that the word "negative" was changed to "skeptical" in the statement of uncontested facts. The word was referring to the attitude of a WSRC doctor toward Lawrence's alleged medical condition. The word was indeed inadvertently changed. WSRC's counsel advised the court, in its filing dated July 7, 2004 that the wrong word was used. Therefore the judge was fully aware of the error. In any event, there is little difference in the meaning of the words and the statement of fact containing the word was not used by the Magistrate or District Judge in reaching their decisions.

Lawrence next complains that the statement containing the phrase "Lawrence was warned that unexcused absences would result in discipline, and future absences would be limited to genuine emergencies." This statement was inadvertently omitted from the written statement.

However, Lawrence did not take advantage of the opportunity to point out the omission (although he did challenge other parts of the statement). In any event, the fact was not relevant to the summary judgment motion and did not relate to any of the grounds for granting the motion for summary judgment.

Lawrence next challenges the omission of the words "by the WSRC medical department." Again, the omission was inadvertent, did not change the meaning or effect of the fact statement and did not relate to any fact relied upon by the court to grant the motion for summary judgment.

Lawrence challenges a change in wording concerning the description of WSRC management concern about Lawrence's outside business and a statement concerning DOE Order 350.01. The changes did not affect the meaning of the statement of fact and, like the other statements Lawrence challenges, do not relate to any fact relied upon by the court to grant the motion for summary judgment.

Lawrence next argues that the Magistrate Judge's orders were contrary and confusing to him and that the briefing deadlines favored WSRC. However, Lawrence fails to point out any procedure ordered by the Magistrate Judge that violated any rule of civil procedure or that was extraordinary. In particular, Lawrence cannot seem to understand that the Magistrate never intended to restrict himself to the statements of uncontested facts to make his ruling. If he did this, Lawrence could simply block summary judgment by refusing to agree to a fact that should have been uncontested. The Magistrate Judge could have, and did, rely upon some issues contained in WSRC's statements of disputed facts because the fact actually

should not have been disputed by Lawrence. For example, if he admitted the fact was true in his deposition.

Lawrence's brief contains a litany of accusations against the Magistrate Judge that are entirely conclusory. Because he cites no specific evidence to support his conclusions, they cannot be addressed.

Lawrence appears to challenge the Magistrate Judge's citations in footnotes 107 through 109 and the magistrate's use of material in WSRC's first memorandum in support of its motion for summary judgment. Lawrence's objection is that the materials were not discussed in any of WSRC's previous pleadings. However, the material was clearly submitted (as the footnote reference indicates) in WSRC's exhibits to its motion for summary judgment. Perhaps Lawrence's objection is that the material was not made part of the statements of contested or uncontested fact. However, as stated above, the magistrate never stated he would limit himself to those statements and, in fact, allowed for the parties to cite to other information.

Lawrence challenges the Magistrate Judge's rulings against him on his requests to compel and for extensions of time. However, he has not denied that the grounds for denying the motions (that his filings with the court violated local rules) were accurate. For example, regarding his motions to compel, Lawrence admitted, in the hearing, that he did not file a certificate of service with the motion that was filed with the court. Therefore, he has no ground for citing this alleged error before this Court. In any event, if Lawrence objected to a discovery ruling by the Magistrate Judge, his proper course was to appeal the decision to the district court. He never did this. In fact, he never

cited these discovery rulings as a grounds for his appeal to the Fourth Circuit Court of Appeals.

Lawrence argues that the Magistrate Judge failed to review the thousands of documents that Lawrence submitted before ruling on WSRC's motion for summary judgment. However, following the hearing, the Magistrate Judge allowed Lawrence to draw the court's attention to all facts and arguments that Lawrence wished to submit. The Judge asked only that the parties first submit statements of uncontested and contested fact. Therefore, Lawrence had ample opportunity to submit whatever he wished. Furthermore, it is Lawrence's burden to not merely rest on his pleadings but to point out facts that raise a material issue. Fed. R. Civ. P. 56(e). In any event, Lawrence failed to raise this issue in his objections to the Magistrate Judge's Report or to the Fourth Circuit Court of Appeals.

The Lower Courts Did Not Misapprehend, or Misapply, South Carolina Law on Employment Contracts that Arise from Employee Handbooks

The general rule in South Carolina is that employment is "at will" and employees, or their employers, may end the relationship at any time, for any reason, or for no reason. *Small v. Springs Industries*, 388 S.E.2d 808, 810 (S.C. 1990); *Prescott v. Farmers Telephone Cooperative, Inc.*, 516 S.E.2d 923, 925 (S.C. 1999). An employer can contractually alter this at-will relationship by issuing an employee handbook that, by its language, limits the employer's right to discharge an employee. However, for a contract to be created, the employee must be aware of promises in the handbook, must have relied on (and continued work in reliance on) those promises, and the

promises must restrict the right to discharge. Finally, of course, there must be some evidence the promise was breached in discharging the employee.

The handbook exception to the at-will employment rule is based on the theory of unilateral contract. *Small v. Springs Industries*, 357 S.E.2d 452 (S.C. 1987). A unilateral contract offer requires that the promissory language in a handbook be manifestly and intentionally communicated to the employee. Only then can an employee accept the offer, and provide consideration, *by relying on it* and continuing to work. *Small*, 357 S.E.2d at 454. ("Small's action in forbearance *in reliance on* Spring's promise was sufficient consideration to make the promise legally binding.") (emphasis added); *Taylor v. Cummins Atlantic*, 852 F. Supp. 1279 (D. S.C. 1994), *aff'd*, 48 F.3d 1217 (4th Cir.), *cert. denied*, 116 S.Ct. 176 (1995)) (the employee ***must be aware*** of the alleged promise and rely on it.[7])

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[7] There are many cases from other states that specifically hold an employee must have been aware of the promissory language in the handbook. *Decker v. City of Wyandotte*, 2002 WL 31956958 (Mich.App. 2002); *Eerdmans v. Maki*, 573 N.W.2d 329 (Mich. 1997); *Birmingham Parking Authority v. Wiggins*, 797 So.2d 446 (Ala. 2001); *Frick v. Univ. Hosp. of Cleveland*, 727 N.E.2d 600 (Ohio 1999); *Irvin v. Community Bank*, 717 So.2d 369 (Ala. 1997); *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995); *Rahrs v. Nebraska Public Power Dist.*, 1995 WL 91557 (Neb. App. 1995); *Crisco v. Board of Educ. of Indian River School Dist.*, 1988 WL 90821 (Del. 1988); *Duldulao v. Saint Mary of Nazareth Hosp. Center*, 505 N.E.2d 314 (Ill. 1987). Although a South Carolina court has not specifically held awareness is required, separate South Carolina courts have held the employee must continue employment in ***reliance*** of the handbook language and, in other contexts, that one cannot rely on something one is unaware of. *Towles v. United Health Care*, 524 S.E.2d 839 (S.C. App. 1999) (must be reliance); *Prescott v. Farmers Telephone Cooperative, Inc.*, 516 S.E.2d 923, 925 (S.C. 1999) (must be reliance); and *Williams v. Texas Co.*, 24 S.E.2d 873,

(Continued on following page)

Therefore, a handbook promise that exists, but the plaintiff does not know about, does not alter the at-will relationship.

To create a contract, a handbook must also make a promise that the employee is entitled to something related to discharge. This is explained, for example, in the case of *Bookman v. Shakespeare*. Shakespeare's written policy promised employees it would investigate all complaints of harassment carefully. Bookman got into a fight with a co-worker because the co-worker was sexually harassing her. 442 S.E.2d 183 (S.C. App. 1994). She claimed Shakespeare violated its written promise to investigate all sexual harassment complaints "promptly and carefully." If they had made a careful investigation, she alleged, the fight would not have occurred. Although the court found that Shakespeare may have breached its promise to investigate carefully, the court held that a promise to investigate "carefully" does not restrict the employer's right to discharge. Shakespeare was free to terminate Bookman because the "careful investigation" promise was not a promise that limited Shakespeare's right to terminate at-will.

The South Carolina Court of Appeals reached the same legal conclusion in *Prescott v. Farmers Telephone Co-op., Inc.*, 491 S.E.2d 698, 702 (S.C. App. 1997) (rev'd on other grounds 516 S.E.2d 923 (S.C. 1999)). In *Prescott*, the company handbook listed types of conduct that could result in discipline. The Farmers Telephone handbook also promised that employees could have the termination

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878 (S.C. 1943) (must have knowledge of the facts for there to be reliance).

decision reviewed by higher levels of management. Critically, the court held, Prescott did not point the court to any language in the handbook promising pre-termination warnings or other procedures. Therefore, the court noted, the case was unlike previous South Carolina handbook cases that dealt with promises of pre-termination procedures. A promise concerning review after the decision was made, the court held, did not limit the right to discharge. The court also held that the listing of conduct that could result in discipline, without promising a certain procedure before discipline, did not limit the right to discharge. *See, also, Epps v. Clarendon County*, 405 S.E.2d 386 (S.C. 1991) (a handbook that did not address pre-termination procedures did not create a contract).

In every handbook case in which the South Carolina Supreme Court has found a jury question, language in the handbook restricted the *pre-discharge* procedure. For example, in *Small v. Springs*, the handbook stated there would be four warnings before discharge and only one was given. 357 S.E.2d 452 (S.C. 1987). In *Jones v. General Electric*, the disciplinary policy stated that offenses "with *repetition* will lead to disciplinary time off and/or discharge." 503 S.E.2d 173, 183 (S.C. App. 1998). Most recently, in *Conner v. City of Forrest Acres*, the handbook stated "employees shall be treated fairly and consistently," and "discipline shall be of an increasingly progressive nature." 560 S.E.2d 606, 611 (S.C. 2002). The South Carolina Supreme Court has never held that the mere recitation of types of discipline, or that promissory language in a handbook that does not relate to the discharge procedure, is enough to create a jury question on an alleged promise to follow certain procedures before discharge.

Because his Complaint was vague, counsel for WSRC carefully examined Lawrence in his deposition about what policies he thought were violated. In his deposition, Lawrence stated that WSRC polices were violated because he was denied due process under WSRC policy 2.9, because he was denied an exit interview, and because his discharge was not approved by the WSRC president. (Tab 1, 132-139). Lawrence testified that he did not know of any other policies that were violated. (Tab 1, 139).

In Lawrence's petition, he alleges that WSRC policy 2.7 was breached. Lawrence raised this issue for the first time to the Fourth Circuit Court of Appeals. He never raised it to the District Court or to the Magistrate Judge. Lawrence never made this assertion in his deposition nor did he argue in any of his numerous filings that policy 2.7 had anything to do with his discharge.

Lawrence did mention, on page 5 of his objections to the magistrate judge's report and recommendation that WSRC (1) should have removed any counselings over one year old from his personnel file and, (2) on page 28 of his objections that a step system of progression toward termination is included within policy 2.7. However, he did not say what counselings had not been removed or that an old counseling was relied on by WSRC in terminating him or that WSRC did not follow certain required steps. His allegation was entirely conclusory and untied to any fact leading to his termination. In addition, these arguments were raised for the first time in the objections and were not argued to the magistrate. In addition, the arguments he raises now regarding policy 2.7 are not the same as those raised in the objections (vague as they are). Lawrence cannot raise an argument now that was not presented in his objections to the magistrate's report and

recommendation. *See, e.g., Cooper v. Ward*, 149 F.3d 1167 (4th Cir. 1998) (unpublished) ("The timely filing of specific objections to a magistrate judge's findings and recommendations is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned that failure to object will waive appellate review. *See Thomas v. Arn*, 474 U.S. 140, 147-48, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wright v. Collins*, 766 F.2d 841, 845-46 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). Lawrence waived appellate review by the Fourth Circuit Court of Appeals and this Court by failing to file specific objections after receiving proper notice.

In addition, Lawrence was carefully examined in his deposition about what policies he was aware of and relied on. (See Tab 1 of WSRC's Motion for Summary Judgment pp. 132-139). He did not mention policy 2.7 and cannot now contradict his sworn testimony in response to WSRC's motion for summary judgment. In fact, Lawrence testified that he did not know of any other policies (other than 2.9 and the miscellaneous policies discussed below) that were violated. (Tab 1, 139). Lawrence cannot create a material issue of fact in opposition to summary judgment by submitting factual assertions that contradict his prior sworn deposition testimony. *See, e.g., Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999); *Rohrbough v. Wyeth Laboratories*, 916 F.2d 970, 975 (4th Cir. 1990); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). As the Fourth Circuit stated in *Barwick*, the utility of summary judgment would be greatly diminished "[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony." 736 F.2d

at 960. "[A]genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Id.* In addition, Lawrence cannot now raise an argument on appeal that he never made to the magistrate judge nor the district court judge. *See, e.g., Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (issues raised for the first time on appeal will not be considered.)

Lawrence, has asserted that policy 2.9 and, to a lesser extent, other policies were violated by WSRC. Each of these is addressed in turn.

WSRC Policy 2.9, like the policies discussed in *Prescott*, deals only with the post-termination process. It does not promise any form of process before discharge. (Tab 2). The policy only discusses the administrative process of termination after the termination decision has been made. It contains no substantive promises that limit WSRC's right to discharge. Although Lawrence has vaguely asserted that 2.9 provides him due process, the policy contains no mention of due process or, in fact, of any pre-discharge process. The policy is analytically the same as the policy in *Prescott*. Both policies deal only with the process of dealing with a terminated employee. Neither promises a pre-termination procedure and therefore neither alters the employee's at-will status.

Lawrence has raised the question of whether or not the WSRC president approved Lawrence's termination. Presidential approval is mentioned in Policy 2.9. Policy 2.9 states that the "president or designee" approves discharges. Like the approval/review process in *Prescott*, this review is not a pre-decision limitation on the right to

discharge. Furthermore, it is uncontested that the president's designee approved Lawrence's discharge. Policy 2.9 clearly states that the president can designate his authority to approve discharges. As the affidavit attached to WSRC's summary judgment motion shows, the WSRC president's delegate approved Lawrence's discharge. (Tab 3).

Lawrence also asserts that he was not given the exit interview promised in policy 2.9. Like everything else in policy 2.9, the "exit interview" is a post-termination procedure. The interview's purpose is not even to review the grounds for discharge but is, instead, to "deal with the employment relationships of the terminating employee." Therefore, this provision did not alter Lawrence's at-will status.

Since WSRC's motion for summary judgment was filed, Lawrence mentioned other policies. However, he has never explained how these policies restricted WSRC's right to discharge. In any event, in his deposition, Lawrence specified that his breach of contract claim was based only on 2.9. (Tab 1, 132-139). He specifically testified that there were no other policies he was relying on. (*Id.*). Lawrence cannot create a material issue of fact in opposition to summary judgment by submitting factual assertions that contradict his prior sworn deposition testimony. *See, e.g., Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999); *Rohrbough v. Wyeth Laboratories*, 916 F.2d 970, 975 (4th Cir. 1990); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). As the Fourth Circuit stated in *Barwick*, the utility of summary judgment would be greatly diminished "[i]f a party who has been examined at length in deposition could raise an issue of fact simply by

submitting an affidavit contradicting his own prior testimony." 736 F.2d at 960. "[A]genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Id.*

In any event, none of the other policies mentioned by Lawrence alter his at-will status. Most notably, Lawrence pointed to the "rules of conduct." The WSRC rules of conduct list only the types of conduct that can result in discipline. The rules do not promise any pre-termination procedure. Therefore, they are exactly like the rules of conduct in *Prescott* and do not limit the right of discharge.

Although he did not testify that it formed a part of his contract claim, Lawrence also complained that he could not be required to report to certain managers about his absences because the attendance policy only mentions management in general. (Tab 1, 12-13, 20, 100, 111, 129). As above, however, an instruction to report to a specific person is not a restriction on the right to discharge, *i.e.*, WSRC did not promise Lawrence he would not be discharged if he reported to any manager. In any event, the absence of a written statement authorizing WSRC to instruct employees does not contractually preclude WSRC from doing so. An opposite conclusion would empower employees to refuse any instruction not specifically authorized in writing. For example, no policy says do not punch your supervisor in the nose. It is nonsensical to argue that Lawrence was permitted to do so.

Lawrence also complains that he could not be required to return to work if he had a medical problem. However, no WSRC policy promises this. His medical problems had

restrictions, not work exclusions. In any event, his termination was ultimately caused by repeated refusal to act as instructed.

CONCLUSION

For the reasons stated above, WSRC therefore requests that the decisions of the lower courts be affirmed.

Respectfully submitted,

Attorney for the Respondent

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This the 10th day of March, 2006

(3)

No. 05 994

In the
Supreme Court of the United States

Christopher Lawrence - *Pro Se* Petitioner

V.

WESTINGHOUSE SAVANNAH RIVER COMPANY LLC - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Introduction

The Respondent Counsel has repeatedly mislead the Courts with statements which are not forthright truthful. The Respondent Counsel had the imprudence to change evidence within the Court record identified as the Statement of Uncontested Facts on 6/15/04 referenced in the Petitioner's Writ; pgs 12-15 and at (App[1] G, 56A-57A). Therefore, this Court should not honor any portion of the responses without reviewing first and foremost, **all of** the material facts, affidavits, policies, court transcripts, and complete depositions pages[1a]. The Respondent's Brief in Opposition to the Petition for Writ of Certiorari is delusional and absurd on its face.[1b]

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1 Petitioner's references as follows: Appendix (App), page number (pg), line number (Ln.), specifically (sp), Deposition (Dep).

1a Petitioner respectfully requests the Supreme Court to refer to previous pleadings, four different notebook references hereafter referred to as: L1[9], L2[10], L3[11], and L4[12], submitted to the record on Appeals dated July 5, 2005, June 5, 2005, August 4, 2004 pleading in objection to the Magistrate report, and July 1, 2004 pleadings of importance.

1b It orchestrates and willfully provides inaccuracies of the core issues in dispute. Therefore, this Court should articulate stare decisis affirming the precedence of South Carolina Supreme Court concerning contract law of dispute. Additional core issue is the legal fundamental standard for Summary Judgment under Fed. R. Civ. P. (56c). A Summary Judgment is properly denied when there are genuine issues of disputed facts. (App I 99A, I100A, I101A, and I102A.) The final core issue is the bias treatment extended towards Respondent counsel which violated procedural due process.

Compelling Reasons for Granting Writ

I. The 4th District Court has not followed the employment contract laws of South Carolina which provide for an "employee manual" exception to the at-will employment standard[2]

II. Reply to Thompson's Jurisdiction and Statement Addressing the Respondent's Statement of Jurisdiction, Counsel has again manipulated the facts of this case. No

Court record filed by the Petitioner presented a claim of violations of Title VII Civil Rights Act of 1964[2a]

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2 **Rule 10(a)** The present 4th Circuit Court of Appeals entered a decision conflicting with previous 4th Circuit Appeals Court's providing for an "employee manual" exception to the at-will employment standard, which conflicts with the South Carolina Supreme Court. In addition, the lower trial Court departed from the usual course of judicial proceedings or sanctions. See Writ at (pgs.16-21). And, **Rule 10(c)** U.S. 4th Circuit Court of Appeals decided and answered a question of important law in South Carolina. This same question should be decided solely by a jury, which conflicts to previous South Carolina Supreme Court Stare decisis. The Supreme Court of South Carolina affirmed that it is the province of the jury to determine the existence and interpretation of a written agreement regardless of the facts of a particular. This is relevant to the decisions and precedence of previous Supreme Court holdings concerning unilateral contract, the relevance and the writings modifying an at-will relationship to an employee Handbook or other writings. These same writings include; (the 5B manual), (DOE contract), and ***(a firm offer of employment under handbook policies which do not have clearly written statements of at-will but rather a pre-discharge policy 2.7. Therefore Respondent is bound to follow certain steps before terminating).*** The Appeals Court in this case abandoned the holding previously affirmed by the Supreme Court of South Carolina which are; the writings that govern the *at-will* condition between an employer and employee. This fundamental right under South Carolina law regarding disputed inferences of contract and/or handbook is galvanized by affirming the previous Court of Appeals reversal in ***Connor, Supra, at 610. Small I & II, Kump, and Prescott.*** See also Small, Supra, 357 S.E. 2d 452, 454. See Baril v. Aiken Regional Medical Center 352, S.C. 271, 573 S.E. 2d 830 (2002). Former Appeals Courts reversed entries of Summary Judgment granted to companies having the same similarities as this particular case. See reversed cases at Petitioner's Writ (pgs. 20-26).

2a The Magistrate at (App I pg. 85a) of Petitioner's Writ recognized the Petitioner's initial complaint was a straightforward contractual action, therefore, the Respondent is **confused** re, arding the case material facts.

Mr. Thompson violates Magistrate Order June 14, 2004[2b]

Mr. Thompson cannot use material which was previously abandoned in his first initial Summary of Judgment; dated 01/05/04. **Mr. Thompson intentionally presented untruths and is confused about the facts related to the Petitioner's attendance record.**[2c] Mr. Thompson abandoned his position in each Court.[4] Mr. Thompson served upon the Petitioner on

9/12/03, **inaccurate** information regarding Mr. Thigpen's[3] file. Thompson has been inaccurate regarding the Petitioner's absences, deposition statement of facts, consistently misstated case law concerning unilateral contracts, write-ups, statements from management and human resources.

2b Because 06/14/04 was the established timeline for presenting any relevant documentation see (Writ App I pgs 83A-92A) Mr. Thompson cannot revert back using his initial [**40-1**] summary. However, to the extent this Court wishes to consider his initial [**40-1**] Summary, the Petitioners 07/05/05 pleading, attachment notebook exhibits, and memos address Mr. Thompson's [**40-1**] and [**41-1**] Summary.

2c Respondent Counsel will be referred to as Mr. Thompson.

3 Mr. Thompson stated the only complaints contained in Mr. Thigpen's file were those sent by Lawrence and neither Employee Concerns nor the EEO groups have records of complaints. The Appeals Court record dated 07/05/05 pg 13, bottom ¶, pg 14, and pg 15 shows this is an absolute lie. Thigpen's behavior history was so chronic, the Respondent's Human Resource recommended Thigpen's removal from a supervisory role. Thigpen was then demoted on or around 10/2004. See (L2[10] notebook, sp. tab 3 exhibits 5, also tabs 1-8). See Earl Brass Dep. at (Book 1 Tab 16 pgs 4, 5, 6, 11, and 12). This same information was presented to the District Court on 7/05/05, pg 14 -15, the Judge stated "it was inaccuracies." See Writ (App C, pg 14A). This also is contrary to the Magistrate Report, and the District Judge's account.

Mr. Thompson is inaccurate relating to Statement of Case and misleads the Court

Mr. Thompson's listing of warnings, counseling, and deficient reviews is totally contrary to Writ (App L annual reviews at exhibits listed in the Writ on pgs 17 and 18, or what was specifically presented in the 7/05/05 pleading WSRC-Lawr exhibits 127, 268-270, 280-283, 250-253, 132-135, 212-215, 220-223, 240-243, and 147 which are the Petitioner's job evaluations. See note[4]. **Thompson confuses the facts outside the 5B manual relating to specific excused absences[5]. Thompson is confused and misleads this Court regarding handbook policy relevant to absences[6].**

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4 On pg 8. last ¶ of Mr. Thompson's initial summary [40-1] filed on 01/05/04, stated "the doctor's note that medical eventually received (on 09/25/2000) indicated Lawrence **could return to work**; Thompson's (Tab 29, 354). Mr. Thompson changed his original position (06/14/04) See Writ (App. I 94A, Ln 23-25 and I 97A Ln 10-11) **did not address the issue of returning to work".** Even after establishing this as a material fact at Writ (App. I 104A Ln 4 and 5), Thompson again changed his position in the Appeals Court on 6/21/05 to now "**the doctor's note indicated that Lawrence could return to work".** Pg. 8, top ¶. Now in this Court, on pg 5 bottom ¶, again, against the material facts established in the Magistrate's Court, Thompson has intentionally mislead this Court.

5 Mr. Thompson abandoned these inaccurate allegations then changed his position in the previous Courts 6/24/04 pleading [**41-1**]. This Court should compare the 1/05/04 pleading [**40-1**] to the response against the Writ. Mr. Thompson changes and/or manipulates words, adds or removes phrases, sentences, and deposition statements to mischaracterize and/or diminish the true facts of the case. How does Mr. Thompson intentionally and unlawfully omit (Tab 6, 77) from his Statement of Uncontested Facts? He also intentionally omitted this same (Tab 6, 77) in his response to the Petitioners Writ due to the facts being irrefutable; see (7/05/05 pleading on pgs 3 and 4.) Mr. Thompson told the previous Courts "the Plaintiff was warned for failing to let supervision know he was going to be absent." The record shows (Tab 4, 50), "on Monday February 12th 1990, Chris Lawrence missed his ride to work-called in at approximately 7am". This is contrary to what the Court record states.

6 Thompson's response at (Tabs 7, 87), (Tab 8, 97), (Tab 9,101), (Tab 10,106) and (Tab 11,116) is inaccurate. See information which contradicts Thompson's responses on (**pgs 3 – 6**, top ¶, "C") Petitioner's 7/05/05 pleading with supportive notebook exhibits).

Mr. Thompson used negative phrases relating to the Petitioner's absences in both the Court of Appeals and Trial Court. He **did not** ever clarify or classify if the 5B handbook policy 2.12 pgs. 15-17 support vacation and/or excused absences. See requested absences and all types; Writ (App MC, pg.197A), (App MC pg. 217A) under, (2) *Time off Without Pay, 2.24 Disability policy (App MD* pgs 220A-252A); 3-3 Make up time (App MF all pgs. **sp 268A**)

Thompson is confused about February 2000 absences and presented an untrue account stating the Petitioner claimed he could not be punished for absences[7].

Thompson is inaccurate; Feb., 2000(Tabs 15,216; 21, 290-291); Apr., 2000 (Tabs 22, 302; 23, 301); May 2000(Tabs 24, 780; 25, 313); June, 2000 (Tabs 26, 330, 331, 328; 27, 332-334); and July, 2000 (Tab 24,780)[8]

Thompson is again untruthful to this Court regarding June 7, 2000, July 28, 2000, (Tab 1, 84-86), (Tab 1, 86), (Tab 24, 780), (Tab 28, 351-352), (Tab 1, 106), (Tab 1, 102), response[9]

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7 To the contrary. Petitioner on pgs 20, 33-34 did not ever speak as Thompson maliciously stated. See Petitioner's Dep. pgs 20-43.
Petitioner's 7/05/05 pleading (pgs 8-13) supports that; No department can enforce a standard policy (not approved nor included) within guidelines of the 5B manual. Again the controlling policies of the 5B; 2.12, 2.24, and 3-3 state; When mgmnt approval is given no consequences for reprimand should follow. **The Court should ask an important question; Were the Petitioner's absences covered under the controlling policies of the 5B manual?**

8 The Petitioner's 7/05/05 pleading (pgs 5 – 13), and exhibits found in Seaborn's (L1[9] notebook memo); Plaintiff's (exhibits 147, 107, and 5), Respondent (policies 2.12, 2.24, 3-3), **substantiates that Mr. Thompson is confused about the true facts of this case.** Regardless of Mr. Thompson's false allegations, the Petitioner's 7/05/05 record shows absences were in fact **granted, excused, approved, and absences were made up.** See the 5B manual policy 2.12 pg. 15 and 16, (Writ App MC Pgs 217A-218A); Writ (App MF pgs 267A-269A).

9 Much of Thompson's confusion is reinforced by not accepting the material facts, 5B handbook policies, misstating case law regarding DOE contract, and Respondent's obligation of compliance. Refer to information contradicting Thompson's account (pg 13 top ¶ through pg 18 at top ¶) of Petitioner's 7/05/05 pleading to the Appeals Court.

To further address Thompson's confusion relevant to the medical issue, it is crucial for this Court to see the 7/05/05 Pleading referencing Dr. Botnick's L4[12] notebook memos and deposition. This will give this Court the facts[10]. **Thompson repeatedly misstated the facts regarding September 22, 2000, July 2001, and August 26, 2001**[11]

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10 Botinck lied to both management (tab 2, exhibit 156), and the Court stating he had not spoken to the Petitioner's doctor (Dep pgs. 9-25 inside record L4[12] notebook 9-25 8/15/00 entry at Tab 1 exhibit 785). Botnick secretly wrote dossier notes in Petitioner's medical file, referencing the

Petitioner's business stating he was tracking and targeting the Petitioner (tab 1 med. entries 8/12/00, 8/25/00;exhibits 125, 522), (tab 3, exhibits 289, 280, 284, 286, and For-1, RB-1, RB-2) Botnick falsely assumed Petitioner's medical status (tab 4, exhibit 363). The fax never stated a return to work date, it did address limitations which had not yet been discussed between petitioner and his physician (tab 4, Rb-4). Botnick admitted he did not know Federal law, nor properly reviewed the Petitioners medical file before making his decision which impacted the post-op procedure. Botnick admitted making occasional errors (Botnick's Deposition pgs 25 and 24).

11 Refer to and consider Thigpen's L2[10] personal animus and behavior issues presented in full detail; (Tab 1, exhibit 22, 24, 29, 30, P3, 14, 6 - 8), (Tab 3, exhibit 20, P2, 950, 951, 21, 5, 926, and 930), (Tab 4, 928, 929, 12,13, 925, and 927), (Tab 5, 463, 9, 464) communicating; (Tab 6 exhibits). Both Thompson and Thigpen admitted to Thigpen yelling and trying to talk above the Petitioner, see Thigpen Deposition (pg 30-55) also Thompson's Admission in Writ (App. I 98A, Lns 15-17). This is in violation of policy 2.12, 2.24, 3-3, 2.9, (2.7 using old informative contacts, doubling petitioner evaluations for stricter assessment, skipping the corrective actions in the disciplinary process, terminating Petitioner 1 month short of completing inappropriate probation after conditions were met under a stricter program per the 5B pre discharge requirement. Writ (App L exhibits and Writ pgs 17-18). Dave Olson's Deposition (pgs 35-37, 11/12/03) and L3[11] includes testimony which conflicts with Thompson's story and Lott's affidavit. Olson who was facility manager states the termination approval came from the President's office not the Vice president or designee. Which one is it?

III. This Case Argues Issues Beyond Compelling Grounds for Supreme Court Review[12a]

Most of Thompson's argument is ***ad hominem*** instead of the material facts of the case. Both District and Appeals Court, established the grounds by not following employment contract laws of South Carolina which provide for an "employee manual" exception to the at-will employment standard. Their decision is contrary to contract law involving unilateral contract, handbook exception and pre-discharge policies governing the at-will relationship in the employer and employee relationship.[12b]

12a Westinghouse, protecting their economic interest [contracts totaling billions; $5,383,459,753.41, $8,400,000, 000, $13,783,459,753.41]; and

other performance base incentives (PBI's), Writ (App K, pgs 107a-143a), affirmed DOE that compliance was in place with regard to hiring and **retaining employees**. Policy and procedure manuals (5B, 8Q, 5Q, and 2S) Westinghouse used to communicate with employees were given to DOE supporting Westinghouse's compliance and deserving of the contract. Westinghouse signed CFR's binding the obligation. The concept for the structure was to assure DOE that a nuclear facility hired and retained competent employees, and treated them properly. This would strengthen the nation's confidence with respect to nuclear power generating facilities. DOE recognized the potential margin for error in nuclear facilities is considerably less than in conventional facilities. For example, if an explosion occurs at a coal-fired plant you may lose lives in addition to economic losses. However, if an explosion occurs at a nuclear facility, you may lose **thousands** of lives and the economic losses are **incalculable**. Westinghouse used Policies and Procedural manuals (P&P) and handbooks to acquire the DOE contract then ignored the provisions within same P&P. This constitutes fraudulent practices causing a breach of contract between DOE and Westinghouse. Petitioner was given (P&P's) and employee handbooks, then told by the Respondent to follow provisions therein. However, this Respondent violated same (P&P's) and employee handbooks, see Writ (pg 20-29) when it did not benefit their needs. Westinghouse employees being incidental beneficiaries of the DOE/ Westinghouse contract having rights which modify the at-will common law under the P&P manuals and employee handbooks which no other "at-will" employee in South Carolina has. Within said rights, Petitioner worked 14 plus years in reliance of said provisions: 2.7, 2.9, 2.12, 2.24(rev 5), 3-3, 2.19, 2.25, and other manuals. Small I and Small II is the breaking point where in ***Small v. Spring Industries, 388 S.E. 2d 808 (S.C. 1990)*** South Carolina Supreme Court held: Termination of an at-will employee normally does not give rise to (a)cause of action for breach of contract (citation omitted). However, certain limited situations, an employer's discharge of an at-will employee may give rise to a cause of action for wrongful discharge such as where the at-will status of the employee is altered by the terms of an employee handbook. **Small v Springs Industries, 292 S.C. 481, 357 S. E.2d 452(1987) (Small I)**. In **Conner**, the Plaintiff was terminated following numerous reprimands over a 12 month period for dress code violations, tardiness, poor work performance, leaving work without permission, and using abusive language. The Court of Appeals reversed the trial Court's Summary Judgment on both breach of contract and bad faith discharge claims. After the Court of Appeals reversal, the Supreme Court of South Carolina affirmed that it is the province of the Jury to determine the existence and interpretation of a written agreement:

(Handbook), (DOE Contract), (DOE Order 350.1) (5B, 5Q, 8Q, and 2S manuals in the provisions therein) in light of the facts of a particular case. ***Conner, supra, at 610***

Both Supreme and Appeals Court of South Carolina reversed numerous cases involving the same fact pattern. The same questions relating the at-will of an employee were altered or removed from the writings embodied within the 5B handbook, policies, DOE contract.

Thompson's reliance on Prescott supra is misplaced[13]

South Carolina Supreme Court has said that interpretation of the handbook language is an issue for the Jury[14]

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13 The handbook had been presented "several months" after Prescott started work and footnotes in the record indicated the handbook was not presented as part of the record on appeal. The Prescott Court dealt only with the oral representations and found them to be too vague for consideration with regards to a firm offer of employment. In this case, the following is required; Respondent is bound by its agreement to DOE. Federal government is to have suitable personnel manuals per the contract and Order 350.1, to retain a quality permanent work force, and conduct business in accordance to those manuals.

14 Summary Judgment in favor of the Defendants in each cited case was reversed, then same cases remanded for trial by jury. Present case argues same legal matters and is reinforced in the Court transcript, Writ pgs 20-26 (App I pgs 93A- 104A) with (emphasis on App I pg 102A) Magistrate judge stated "the contract is a legal issue but based on a factual predicate."

Thompson's confusion alleging technicalities

Thompson is confused and tries to mislead this Court to think the Petitioner never raised an issue of violation to the DOE contract, the 5B manual policies and procedure[15]. Thompson uses misplaced **unpublished** material in *Cooper v Ward.* This is an insult to U.S. Supreme Court by asking it to follow a decision unpublished from the record. Petitioner's objecting to the Magistrate report identified is unlike *Lockert v. Faulkner, 843F. 2d 1015, 1017-1019(7th* Cir. 1988), Thomas v. Arn, and the other cited case on pg 20 of Thompson response.[16]